

PART IV

CLEMENCY REVIEW POLICY AND PROCEDURES

401. Eligibility for Clemency Review. The cases over which SECNAV (NC&PB) has jurisdiction to conduct clemency review are established in paragraph 304 and as hereinafter defined as eligible. Only selected offenders convicted by special or general courts-martial whose sentences have been approved by the convening authority are eligible for initial and, as required hereinafter, subsequent clemency review. The categories of selected offenders eligible for clemency review by NC&PB are:

a. Mandatory Clemency Review. Any offender whose sentence as approved by the convening authority includes confinement for 12 months or more, including any offender

(1) who has been transferred to the jurisdiction of the Attorney General of the United States and/or is incarcerated in a facility of the FBOP serving a term of confinement adjudged by court-martial; or

(2) who has been released on parole from an FBOP facility by the U.S. Parole Commission and is under the supervision of a USPO; and

(3) who has not submitted a written waiver of clemency review is entitled to mandatory clemency review until released from supervision either because of completion of *supervised release (as if on parole)* or completion of confinement due to completion of full-term date while on parole.

b. Requested Clemency Review. Any offender whose sentence as approved by the convening authority includes confinement for less than 12 months and an unsuspended punitive separation or any supervised releasee of a *military facility or facility* of the FBOP after service of a term of confinement adjudged by court-martial who submits a written request for clemency review is entitled to clemency review.

c. Coast Guard. Upon request of the Commandant of the U.S. Coast Guard, any Coast Guard offender's case will be reviewed and an advisory opinion provided the Commandant of the U.S. Coast Guard.

d. Clemency Flow Chart/Matrix. Appendix E provides a visual depiction of the clemency eligibility decision matrix. Nothing in Appendix E, however, should be construed as mandating actions or decisions not required within the main text of this instruction.

402. Eligibility for Types of Clemency. All offenders eligible for clemency review may be granted clemency of an appropriate type with regard to the unexecuted portion of the sentence in consonance with the objectives and evaluative criteria set forth in Part III of this instruction. (See paragraphs 309 and 310.)

a. All offenders whose sentences include approved confinement for 12 months or more or an approved, unsuspended punitive separation will ordinarily be eligible for remission, mitigation or suspension of any unexecuted portion of their sentences, including the upgrading of the punitive discharge/*dismissal* or substituting the unexecuted punitive discharge/*dismissal* with an administrative discharge *either (1) under honorable conditions or (2) under other than honorable conditions (OTH).*

b. All offenders whose sentences include an approved, unsuspended, *unexecuted* punitive discharge or unsuspended dismissal are eligible for restoration, retention or reenlistment, if

(1) they are suitable, as defined in subparagraph c below, and evidence, by written request, a desire for restoration, retention or reenlistment; and

(2) they have completed all or a portion of the sentence to confinement, if any was adjudged or ordered executed without suspension.

c. Ordinarily the following offenders are not eligible for restoration, retention or reenlistment:

(1) Offenders convicted of an offense involving serious violence, national security as defined in the JAGMAN, distribution of controlled substances, desertion or unauthorized absence from a ship or unit in or scheduled to enter a combat area, sexual perversion, or theft from another service member.

(2) Offenders who are mentally or physically unsuitable for duty, or have a record of military or civilian offenses indicating incorrigibility.

c. Restoration or retention of an offender is accomplished either by remitting the *unexecuted* punitive discharge/*dismissal* or by suspending the approved, *unexecuted* punitive discharge/*dismissal* for a stated period of service or until the occurrence of an anticipated future event, the period of suspension not normally to exceed 1 year. The NC&PB will specify the period of suspension or any anticipated future event whenever it grants or recommends restoration to duty by suspending the *unexecuted* punitive discharge/*dismissal*.

(1) The unsuspended, *unexecuted* punitive discharge of an enlisted offender may be suspended and the offender restored to duty only if sufficient time remains on the offender's current enlistment (as extended by lost time) to permit service through the entire period of suspension.

(2) The unsuspended, *unexecuted* punitive discharge of an enlisted offender who does not have sufficient time remaining on the current enlistment (as extended by lost time) may be suspended if the offender agrees in writing, prior to the effective date of the

suspension, to an appropriate extension of enlistment to enable the offender to serve the entire period of the suspension.

e. Any period of suspension directed by the NC&PB begins and expires as directed by NC&PB or SECNAV. The date the suspension period begins to run ordinarily is the date of the NC&PB action. Expiration of the period of suspension will automatically cause the remission of the punitive *discharge/dismissal* unless the suspension is sooner vacated. The suspension may be vacated for cause in accordance with the MCM and other pertinent regulation and law. The NC&PB must be notified in writing of the vacation of any suspension.

f. *Select offenders whose punitive discharge or dismissal has been executed are eligible to apply for clemency to substitute, for good cause, an administrative discharge for an executed punitive discharge or dismissal. Specifically, NC&PB's jurisdiction is limited to considering those cases where the service member is retirement eligible (i.e., 20 years or more of creditable service) and where the service member files a clemency request with the NC&PB within 5 years of the date of the executed punitive discharge or dismissal.*

403. Clemency Review Eligibility Date. NC&PB will conduct an initial clemency review of the cases of all offenders eligible for clemency review within 60 days of the offender's clemency review eligibility date as defined below. Any required subsequent reviews will be conducted within 30 days of the anniversary of the clemency review eligibility date.

a. The clemency review eligibility date for all mandatory clemency review cases usually is 9 months from the day confinement began. The clemency review eligibility date for all requested clemency review cases is 10 days after the date the offender submits a request for clemency review to the convening authority or the OEGCMJ. *This paragraph does not apply to those offenders serving approved sentences of confinement for life without parole, if that sentence was adjudged for an offense committed on or after 30 October 2000.*

b. For purposes of establishing the clemency review eligibility date, the "confinement begin date" includes a constructive date calculated as follows: adjudged date minus all days of pretrial confinement and any administrative pretrial confinement credits plus (+) the days the sentence to confinement was properly deferred. Subsequent reviews conducted annually thereafter means until completion of *supervised release (as if on parole)* or at full-term date for those released from confinement on parole. (See paragraph 405b for procedures for clemency review for offenders whose completion of confinement occurs prior to the execution of their punitive separation.)

c. From the Results of Trial received by the Office of the Chief Judge, Navy-Marine Corps Trial Judiciary at the end of each calendar month, the Chief Judge shall (upon request by the President, NC&PB)

provide the name of any offender tried by court-martial who was adjudged a punitive separation and confinement of 12 months or more, the date sentence was adjudged, the identity of the convening authority and, if possible, the period the offender spent in pretrial confinement and the sentencing conditions of any pretrial agreement (particularly as it relates to the period of confinement approved and suspended).

d. Upon receipt of information that NC&PB has jurisdiction over a case, the NC&PB will monitor that case in relation to its clemency review eligibility date. If the NC&PB has not received a copy of the offender's record of trial, court-martial order, and post-trial progress report within 60 days of the offender's clemency review eligibility date, the NC&PB will initiate action to obtain the required documentation. Within 30 days of receipt of all required documentation, the NC&PB will conduct the offender's initial clemency review with subsequent clemency reviews conducted thereafter within 30 days of the offender's clemency review eligibility date. *Eligibility dates are as follows:*

(1) When the approved, unsuspended sentence to confinement is 12 months or more but less than 20 years, initial clemency review will usually occur no later than 9 months from the date confinement began or within 90 days after the convening authority's action and at least annually thereafter.

(2) Following the initial clemency review (see Section 403d(1)), when an offender's approved, unsuspended sentence is 20 years or more but less than 30 years, subsequent clemency review by the NC&PB shall be at least annually beginning 3 years from the date confinement began.

(3) Following the initial clemency review (see Section 403d(1)), when an offender's approved, unsuspended sentence is 30 years or more, including life, subsequent clemency review by the NC&PB shall be at least annually beginning 10 years from the date that confinement began. This paragraph affects only those offenders in which any act with a finding of guilty occurred on or after 16 January 2000. For offenders whose offenses with a finding of guilty occurred prior to that date, and with unsuspended, approved sentences of 30 years or more, including a sentence to confinement for life, subsequent clemency review by the NC&PB shall occur not more than 5 years from the date confinement began and at least annually thereafter. This paragraph does not apply to those offenders serving approved sentences of confinement for life without parole, if that sentence was adjudged for an offense committed on or after 30 October 2000.

(4) When a offender's approved, unsuspended sentence for an offense committed on or after 30 October 2000, includes confinement for life without parole, initial clemency review by the NC&PB shall be

at least once every 3 years beginning 20 years after the date confinement began. SECNAV may not delegate the authority to grant clemency for approved sentences of life without parole. Subordinate clemency approval authorities may deny clemency for approved sentences of life without parole.

(5) Offenders sentenced to death are ineligible for clemency review by the NC&PB, unless the President commutes the death penalty to a lesser punishment.

(6) In those cases involving requested clemency review, the NC&PB will usually conduct a clemency review within 60 days of receipt of that request. If the NC&PB does not have the documents required to conduct its review but has received a copy of the request, it will initiate procedures to obtain those documents.

e. The NC&PB may omit a scheduled clemency review when an offender waives clemency review under the procedures set forth in paragraph 410.

f. The NC&PB, upon receipt of significant new information about an offender, may, on its own motion, conduct a clemency review before the offender's next clemency review eligibility date.

g. Except in the case of offenders sentenced to death, or to confinement for life or life without parole, an individual may, for cause, be granted special consideration by NC&PB for clemency, restoration, or reenlistment.

h. When an offender is considered for parole under Part V of this instruction, the NC&PB will also conduct a clemency review, to include, upon request, restoration to duty or reenlistment. If the offender is denied parole, the date of that denial establishes the offender's clemency review eligibility date for subsequent annual reviews.

i. After an offender is released on parole by the NC&PB, the NC&PB will conduct a clemency review within 30 days of the 1-year anniversary of the parole release date. Thereafter, the NC&PB will conduct the annual clemency review within 30 days of the anniversary of the date parole began; thus, the offender's parole release date becomes the clemency review eligibility date for subsequent annual reviews.

j. If a parolee is returned to confinement following revocation of parole, the NC&PB will resume conducting clemency reviews within 30 days of the anniversary of the clemency review eligibility date upon the offender's service of 1 year of confinement after return to confinement from parole.

k. In cases involving mandatory clemency review, where the convening authority's action is taken after an offender's clemency review eligibility date, or where lack of documentation prevents NC&PB

from conducting a timely review after reasonable attempts to obtain such documents, the NC&PB may, with or without using the evaluative criteria set forth in paragraph 310, grant clemency in an amount that does not exceed the unexecuted confinement, forfeitures or fine, including periods of suspension, equivalent to the lapse of time between the clemency review eligibility date and the date of review. Punitive separations are not affected by this administrative enforcement provision. Additionally, this administrative enforcement provision is not intended to and does not create any rights, substantive or procedural, enforceable at law by any offender or any other person in any matter, civil or criminal.

1. Failure of NC&PB to receive the documents required for conducting clemency review within 90 days after an offender's clemency review eligibility date, without good cause shown, will permit the NC&PB to invoke the enforcement provision found in paragraph 403k. Good cause ordinarily consists of something that affected either (1) the decision not to request clemency review that was beyond the control of the offender such as receipt of information that was unknown or unavailable to the offender at the time the decision had to be made; or, (2) a reasonable explanation from the convening authority as to what caused the delay in taking action within the 6 month period before the clemency review eligibility date such as the complexity of the issues that had to be resolved by the convening authority before action could be taken. If good cause is found to exist, the NC&PB will review the case, including those cases in which no portion of the sentence remains unexecuted. In those cases in which no portion of the sentence remains unexecuted, the NC&PB will make a determination that its review of unexecuted portions of the sentence was hindered by the good cause found and recommend corrective action, if appropriate, to the Secretary.

404. Schedule for Clemency Review. Offenders who are eligible for mandatory clemency review (except for offenders in the custody of the FBOP or under the supervision of a USPO) and offenders who desire to request clemency will act in accordance with the following schedule:

a. Mandatory Clemency Review. Within 10 days after receipt of the convening authority's action in the offender's case, an offender eligible for mandatory clemency review who does not desire clemency review by the NC&PB will submit to the convening authority or the OEGCMJ, in writing, copy to NC&PB, a waiver of mandatory clemency review. This waiver should include signature and date to ensure compliance with applicable time goals. The procedures for such a waiver are provided in paragraph 410. The offender is entitled to the advice of defense counsel before submitting such a waiver. (See paragraph 410b.) Upon expiration of the 10 days, if a waiver of clemency review has not been received by the convening authority, the convening authority will forward to NC&PB a copy of the offender's record of trial, court-martial order and will ensure that a post-trial progress report is submitted.

b. Requested Clemency Review. No later than 10 days after the receipt of the convening authority's action, an offender not eligible for mandatory clemency review but eligible to request clemency review will notify the convening authority or the OEGCMJ, in writing, copy to the NC&PB (and another copy to Navy and Marine Corps Appellate Leave Activity), that the offender requests clemency review. The offender then has 20 days within which to file the request for clemency review and any supporting documents with the convening authority or OEGCMJ. Failure to meet the submission requirements in a timely manner, without good cause shown, may result in denial by NC&PB of the request for clemency review. The offender is entitled to the assistance of defense counsel in submitting such a request.

c. The offender's trial defense counsel will ensure that offenders eligible for annual mandatory clemency review are advised of their clemency review eligibility date. Offenders may waive an annual mandatory clemency review and, if that is their desire, the procedures set forth in paragraph 410 will be followed.

d. Offenders may withdraw their case from clemency review by the NC&PB any time prior to the NC&PB's review by submitting a signed written withdrawal to the NC&PB witnessed in accordance with the provisions of paragraph 410f. The signed written withdrawal may be in the form of a letter or a pen-changed modification of *DD Form 2715-3*, the pen-change indicating "withdrawal" or "withdraw," as appropriate, wherever the word "waiver" or "waived" appears.

e. Waiver of submission of matters under Rule of Courts-Martial 1105 does not constitute a waiver of clemency review under the provisions of this instruction.

405. Initiation of Clemency Review

a. Offenders Who Are Confined. For offenders who will be in confinement at the time of their clemency review eligibility date, the commanding officer will, without further direction, determine the offender's clemency review status. If the commanding officer determines that an offender subject to mandatory clemency review has not submitted a waiver in accordance with paragraph 404a, or that an offender has requested clemency review in accordance with paragraph 404b, the commanding officer will initiate the clemency review process without further direction.

b. Offenders Who Are Not Confined. For offenders who will not be in confinement at the time of their clemency review eligibility date, the convening authority will determine whether the offender has waived clemency or requested clemency without further direction. If the convening authority determines that the offender subject to mandatory clemency review has not waived clemency review, or an offender has requested clemency review, the convening authority will initiate the clemency review process without further direction. The fact of receipt or non-receipt by the convening authority of a waiver of mandatory

clemency review or a request for clemency review per the schedule set forth in paragraph 404 may be the basis upon which a determination is made to initiate the clemency review process.

406. Special Clemency Reviews

a. Commanding officers may submit clemency review documentation to the President, NC&PB, for a special review any time before execution of the punitive separation or completion of confinement. This type of request normally should be reserved for instances in which newly discovered, substantially relevant information would alter a previous recommendation *or for cases being reviewed for special holiday release. Notwithstanding other provisions in this Instruction, NC&PB is delegated final decisional authority in special holiday release cases.*

b. The CMC and the BUPERS may request special reviews as deemed necessary.

c. The SECNAV; the Director, NCPB; and the President, NC&PB, may direct special reviews; and the NC&PB itself may review cases on its own motion.

d. Those recommending special clemency review should ensure the NC&PB has a post-trial progress report as current as possible, although the convening of a special Disposition Board is not required.

407. The Post-Trial Progress Report. The post-trial progress report includes, but is not limited to, the following:

a. A signed written request for clemency for those cases where the offender is not entitled to mandatory clemency review.

b. A statement, in some form, from the offender stating the type and amount of clemency requested and the reasons for the clemency requested; otherwise NC&PB will review the offender's case and consider all types of clemency.

c. An evaluation from either the offender's commanding officer or the convening authority regarding the offender's attitude, conduct and performance since sentence was adjudged if the offender returned to duty for more than 90 days after release from confinement.

d. An evaluation from either the offender's commanding officer or the convening authority regarding the offender's potential for restoration, retention, or reenlistment and appellate leave status.

e. A psychological/psychiatric evaluation, if one has been completed since the date sentence was adjudged, or if one is deemed appropriate in light of circumstances known or made known to the commanding officer or the convening authority prior to or since the date sentence was adjudged, including a substance abuse/dependency evaluation, if appropriate.

f. Endorsements of officials in the chain of review.

g. The following forms will be used in connection with the clemency review of eligible offenders except those in the custody of the FBOP or under the supervision of a *USPO*.

(1) To request clemency review *DD Form 2715-3*, or its equivalent (required only for those offenders not eligible for mandatory clemency review).

(2) To prepare post-trial progress reports

(a) For offenders confined at their clemency review eligibility date -- *DD Forms 2715, 2715-1, 2715-2, 2715-3, and 2719*, or their equivalent, may be used.

(b) For offenders not confined at their clemency review eligibility date--a status report relating information of a nature similar to that contained in *DD Forms 2715, 2715-1, 2715-2, 2715-3, and 2719*, but modified to reflect a non-confinee's attitude, conduct and performance of duty, including:

1. Comments from the offender's immediate supervisor if the offender returned to duty for more than 90 days after release from confinement.

2. A substance abuse/dependency evaluation if the offense for which the offender was convicted was alcohol or drug related or the offender has a history of such abuse.

3. If the offender had been confined as the result of an adjudged sentence by court-martial but released from confinement due to completion, deferment or suspension of confinement, comments should include the commanding officer's evaluation (*DD Forms 2715, 2715-1, 2715-2, 2715-3, and 2719* or their equivalent, as appropriate) of the offender while in confinement.

(c) For offenders on appellate leave at the time of their clemency review eligibility date, the convening authority or the OEGCMJ over the offender at the time of his/her release from confinement will forward a copy of the offender's executed appellate leave orders and notify the NC&PB of the status of the payment of any fines adjudged against the offender, or any restitution made to any victims, if any, and all other relevant information.

h. If NC&PB is not in receipt of a post-trial progress report on an offender still serving confinement at the time the offender is eligible for annual (i.e., subsequent to the initial) review of his/her case, NC&PB will hear the case as scheduled without such report unless it directs that review be held in abeyance until the report is received.

408. Timeliness and Schedule for Submission of Post-Trial Progress Reports. For NC&PB to conduct an initial clemency review within 60 days of the offender's clemency review eligibility date, and within 30 days of the anniversary of the offender's annual clemency review eligibility date, the post-trial progress report must be received in a timely manner. To ensure that timeliness, the following provisions for submission of the post-trial progress report are established:

a. Post-trial progress reports on offenders with approved unsuspended punitive separations and less than 12 months confinement who will not be confined at the time of their clemency review eligibility date will be submitted to the NC&PB as soon as practicable but no later than 30 days after the date of the request.

b. Post-trial progress reports on offenders who will be in confinement at the time of their clemency review eligibility date will be submitted to the NC&PB when the offender has served 7 months from the date confinement began and then annually thereafter on the anniversary of the clemency review eligibility date until completion of service of sentence to confinement.

c. Post-trial progress reports for offenders programmed for transfer to the custody of the FBOP will be submitted to the NC&PB 4 months prior to the projected transfer date, if possible. Each of these post-trial progress reports should be clearly marked as pertaining to an upcoming Federal transfer. NC&PB will forward to the U.S. Parole Commission (with recommendations, as appropriate) a copy of the offender's briefing file held by NC&PB.

d. Copies of the offender's post-trial progress reports will accompany an offender when the offender is transferred to another naval brig or confinement facility for completion of service of the offender's court-martial sentence. One copy of the offender's most recent post-trial progress report that accompanies the offender upon transfer and a copy of the offender's transfer orders will be sent to NC&PB. Should the offender's conduct have significantly changed since the date of that most recent progress report, comments to that effect should be made by endorsement of the commanding officer.

409. Procedures for Submission and Endorsement of Post-Trial Progress Reports for Clemency Review

a. Commanding officers will submit the original of the post-trial progress report to the President, NC&PB, on offenders not in confinement at the time of their clemency review eligibility date in accordance with the schedule set forth in paragraph 408a and the requirements of paragraph 407.

b. Commanding officers will submit the original of the post-trial progress report to the President, NC&PB, on all naval service

personnel in confinement at the time of their clemency review eligibility date in accordance with the schedule set forth in paragraph 408b.

c. Commanding officers will ensure that the post-trial progress reports are completed as follows:

(1) All required DD forms, or their equivalent, comprising the basic progress report, plus the individual's clemency request, if any, will be completed in their entirety except as provided in paragraphs 409d and 409e.

(2) All offenders who have an approved sentence will be evaluated for substance abuse/dependency. The substance abuse/dependency evaluation will be made by a trained substance abuse counselor whose primary duty is screening and evaluating service members for substance abuse/dependency. If the substance abuse counselor determines the offender is dependent or cannot resolve the dependency issue by finding non-dependency, the substance abuse counselor will refer the offender to a psychiatrist or clinical psychologist trained in substance abuse matters for a medical diagnosis in accordance with the nomenclature of the *current* Diagnostic Statistical Manual (DSM), if appropriate. Where there is no psychological/psychiatric diagnosis, the evaluation will so state. If the offender has had any contact with the Navy or Marine Corps Substance Abuse Program prior to incarceration, that fact should be brought to the attention of the NC&PB. (See reference (j).)

(3) For offenders convicted of sex offenses or other serious violent crimes whose approved unsuspended sentence to confinement includes 12 months or more, a psychiatric/psychological evaluation will be completed by a psychiatrist, clinical psychologist, or clinical social worker trained in the evaluation and treatment of those types of offenders necessary to meet their specific treatment and therapeutic rehabilitation.

(a) The evaluation will include a complete, individualized psychological/psychiatric history of the offender.

(b) A diagnosis consistent with the nomenclature of the *current* DSM will be recorded. Where there is no diagnosis, the evaluation will so state. The relationship between the psychopathology (including substance abuse or dependency) and the confining offense will be specified, even if the psychopathology did not render the offender incompetent. If there is a relationship between psychopathology (or substance abuse/dependency) and the offense, the probability of recurrence of criminal behavior should be clearly stated.

(c) In cases involving child abuse, sexual abuse, or other serious violence against a person, a recommendation concerning treatment should be made. Whether or not treatment is recommended, an

assessment of the offender's threat to society will be included. If the offender has had any contact with the Family Advocacy Program of the Navy or Marine Corps, that fact should be brought to the attention of the NC&PB.

(d) Psychiatrists, clinical psychologists, or clinical social workers must also estimate the probable efficacy of post-discharge treatment program(s) if there is any history of psychological or substance abuse problems, and indicate whether or not the individual is motivated for such a program, if appropriate.

(e) Psychiatrists, clinical psychologists, or clinical social workers may comment on any part of the sentence which they believe should be modified.

(f) The psychological or psychiatric evaluation should be amended or a new evaluation prepared whenever new information might change the impression, diagnosis or prognosis.

(4) The post-trial progress report should state the citizenship of the offender. In cases of an offender who is not a U.S. citizen, the report should indicate the date and place of entry and, where applicable, the alien registration number.

(5) A statement will be included indicating that an FBI National Crime Information Center (NCIC) computer system criminal history check has been made and the results.

(6) A victim impact statement, if appropriate and available, consistent with the evaluative criteria found in paragraph 310f may be considered.

(7) A disposition board will submit recommendations and supporting reasons in the cases of all offenders confined in naval brigs.

(8) The commanding officer will submit recommendations and supporting reasons in the cases of all offenders confined in naval brigs.

d. If the sentence does not include confinement or if confinement has been deferred or suspended from the date confinement was adjudged, a report of a disposition board and a commanding officer is not required, and those portions of DD Forms 2715-2719 or their equivalent that refer to performance in confinement are not applicable. The remainder of the forms, however, will be completed by the convening authority or the OEGCMJ.

e. If the commanding officer is unable to forward a complete post-trial progress report because the adjudged or sentenced offender refuses to cooperate in its preparation, is an unauthorized absentee

or because of an explained administrative error, the commanding officer will forward the incomplete report and state therein the reasons prescribed procedures could not be followed.

f. If an offender executes a request or waiver which is a change from one previously forwarded, or if new information is obtained which would result in a change to a recommendation on a request previously forwarded, and, in either situation, final action as described in paragraph 314 has not been taken by NC&PB, the commanding officer will notify the NC&PB immediately. Appropriate forms and information supporting the new request, waiver or recommendation will be forwarded to NC&PB as soon as practicable. This paragraph will not be construed as authorizing a withdrawal of a waiver previously forwarded.

g. The NC&PB will request prison wardens to submit progress reports and any recommendations, if appropriate, for clemency in the cases of naval offenders who are serving sentences of courts-martial in the custody of the FBOP. If such offenders have been paroled from the FBOP, the NC&PB will request reports and recommendations from supervising U.S. Probation Officers. Requests from offenders, either incarcerated or paroled, are not required. The reports and recommendations should be executed at the frequency stated in paragraph 408b and should be forwarded directly to the President, NC&PB.

h. If the convening authority has not previously forwarded to the NC&PB one copy of the offender's record of trial and courts-martial order at the time the post-trial progress report is submitted, those documents must be forwarded in conjunction with the submission of the post-trial progress report.

i. Although this provision refers to clinical psychologists and clinical social workers, it is understood that BUPERS may, upon submission of qualifications, waive the requirements and accept psychological evaluations from any civil service rated psychologist who has been trained in the treatment and rehabilitation of the specific offense. If no such individual is available at the naval brig, however, then the offender will be referred for such evaluation.

410. Procedures for Waiving Mandatory Clemency Review

a. The convening authority, commanding officer, or the OEGCMJ (the authority geographically closest to the offender unless otherwise designated by the OEGCMJ) will ensure that offenders waiving mandatory clemency review understand clearly:

(1) The consequences of their options as outlined on DD Form 2715-3.

(2) That the NC&PB will not review the case again until the next annual mandatory clemency review unless scheduled or directed as provided by paragraph 406.

(3) That NC&PB's mandatory clemency review is an administrative process that is independent of, and different from the clemency review available under Article 74, UCMJ; R.C.M. 1105, MCM; and the provisions of 10 U.S.C. secs. 1552 Board for Corrections of Naval Records (BCNR) and 1553 Naval Discharge Review Board (NDRB).

b. The waiver of initial mandatory clemency review will be executed by the offender in the presence of and witnessed by the offender's trial or appellate defense counsel, ordinarily a judge advocate certified in accordance with Article 27(b), UCMJ, his/her civilian attorney or a judge advocate detailed or made available for the sole purpose of advising the offender of the clemency options available and their consequences. A judge advocate detailed solely for the purpose of advising the offender of clemency options will make clear to the offender the limited extent of this service and that such advice will not be construed as establishing an attorney-client relationship although attorney-client confidentiality will be observed.

c. If an offender waives the initial mandatory clemency review, the convening authority, commanding officer or OEGCMJ, as appropriate, will forward the original of the completed Waiver of Clemency Review, *DD Form 2715-3*, or its equivalent, and a copy of the court-martial order or results of trial directly to the President, NC&PB, per the schedule for submission of post-trial progress reports. (See paragraph 408.)

d. A waiver of initial mandatory clemency review by offenders with sentences of 2 years or less constitutes a waiver of all clemency review by the NC&PB because their minimum confinement release date will ordinarily occur before the first anniversary of their clemency review eligibility date. (A copy of the offender's record of trial and court-martial order must be forwarded to the NC&PB in all cases in which the offender's approved sentence to confinement includes an approved 18 months or more despite the offender's waiver of initial clemency review in order for NC&PB to review the offender's case should the offender request parole.)

e. After an offender has submitted a waiver of initial mandatory clemency review, that offender may waive any subsequent annual mandatory clemency reviews by executing the waiver form in the presence of a judge advocate, civilian lawyer or commissioned officer. The lawyer or commissioned officer will advise the offender of the clemency options and their consequences and will witness execution of the form. Advice provided by the judge advocate is limited and does not result in the formation of an attorney-client relationship unless that judge advocate is continuing an attorney-client relationship as a result of assignment as the offender's trial defense or appellate defense counsel.

f. An offender may rescind any waiver of clemency review he/she submitted within 90 days of the date of the execution of the waiver. Rescissions will be submitted via the offender's commanding officer, copy to NC&PB. The commanding officer will forward the rescission with recommendations regarding clemency within 10 days of the receipt of the rescission. By copy of the commanding officer's endorsement of the offender's rescission, the commanding officer notifies the OEGCMJ over the offender at the time of the offender's court-martial of the rescission in order to ensure compliance with the clemency review documentary filing requirements set forth in this instruction except as provided in subparagraph g. below as well as the admonition specifically set forth in paragraph 414.

g. Post-trial progress reports are not required in cases in which the offender waives mandatory clemency review. If an offender who has waived clemency review rescinds that waiver, a post-trial progress report is required only if the offender is still in confinement on the date of rescission. If the offender who rescinds a waiver is not confined at the time of rescission, but desires NC&PB to consider information relating to his/her behavior, attitude and progress during his/her period of confinement, it is the offender's responsibility to obtain and submit such information. The offender may submit statements from naval brig personnel and others attesting to their individual vice official opinion as to the offender's behavior, attitude and progress during and after confinement. A Disposition Board is not required.

h. The forwarding endorsement on the Waiver of Clemency Review will contain a certification that the offender submitting the waiver is either:

(1) Not substance dependent within the meaning of *the current* DSM and *the current* International Classification of Diseases, or,

(2) Has been offered treatment through either a military treatment facility (MTF) or the Department of Veterans Affairs (VA).

i. Since mandatory clemency review under this instruction is an administrative review outside the UCMJ, a waiver of appellate review, in and of itself, does not constitute a waiver of initial mandatory clemency review under this instruction although it may be a waiver with regard to clemency review under regulations implementing Article 74, UCMJ. In order for a waiver of NC&PB review to be valid, it must contain a specific statement indicating the offender also waives mandatory clemency review before NC&PB. An offender's waiver of Rules for Courts-Martial (R.C.M.) 1105 submissions is not a waiver of clemency review by NC&PB.

j. Waivers of mandatory clemency review subsequent to the initial clemency review should be submitted per the schedule for submission of post-trial progress reports set forth above.

k. Copies of waivers of NC&PB clemency review will be forwarded to the OEGCMJ.

411. Notification of Offenders Pending Appearance Before Clemency Hearing. Once a clemency review is scheduled for an offender eligible under the provisions of this instruction, the NC&PB shall notify the confinement facility of the offender prior to the date of the review.

412. Action Upon Receipt of NC&PB-Promulgated Clemency Decisions

a. The CMC or BUPERS, as appropriate, will ensure that the clemency decision is entered in the field service record or service record book of the offender, and any known victim is informed, as required by reference (p). Entries will include action directed, the date of the action, the authority and, if applicable, the rationale. In cases of restoration to duty, the entry will include the date specified for restoration to duty, the period for which the unexecuted portion of a sentence is suspended and the total unexecuted portion of the sentence remaining to be executed if the suspension is subsequently vacated. If the offender has completed the period of confinement and only the punitive separation is suspended incident to restoration, the fact should be clearly stated: "No confinement remains to be served on this sentence."

b. If clemency review results in modification of the sentence, the OEGCMJ will, except as otherwise provided in paragraph 414 of this instruction, issue a supplementary court-martial order implementing such action. The OEGCMJ will provide the offender with a copy of that action. (The OEGCMJ should send the copy to the most current address known. *The OEGCMJ is on notice of that address if the offender is still serving sentence to confinement either in a naval brig or the FBOP or is on parole or supervised release at the time of the supplementary court-martial action.*)

c. Where final clemency action taken under this instruction results in the suspension or remission of a punitive separation, *thereby restoring* the offender to active duty, administrative discharge proceedings may not be initiated against the offender except for matters separate and distinct from those involved in the court-martial for which the clemency action was taken. "Matters separate and distinct" is misconduct on the part of the offender that occurred subsequent to the date of the convening authority's action or of which the NC&PB was not aware at the time it took its action. This does not prohibit the initiation of vacation proceedings and action taken under R.C.M. 1109(e), where appropriate, nor does it prohibit the discharge of the offender if that discharge is in accordance with his/her service record.

d. Should the NC&PB promulgating order direct that the offender be afforded an opportunity to participate in a treatment/rehabilitation program which the offender had waived prior

to the NC&PB action, the OEGCMJ will re-offer the program to the offender.

e. All clemency actions ordered under this instruction are effective *the date of the NC&PB/SECNAV decision*.

f. In those cases where clemency action remits confinement to the extent the offender's sentence to confinement has been completed but judicial review has not been completed, the OEGCMJ, or other proper authority, should ensure that the offender has valid appellate leave orders with instructions relating to the obtaining/retaining of a valid AFIC. (See paragraph 517h.)

413. Unsatisfactory Performance/Conduct. Unsatisfactory performance/conduct on the part of an offender which is sufficiently serious to be made a matter of official record and which becomes known after submission of the post-trial progress report, but prior to receipt of final action relating to clemency or prior to the issuance of the supplementary court-martial order implementing a grant of clemency, will *initiate* the following process:

a. The commanding officer, the convening authority or the OEGCMJ will, without delay, report the circumstances of the unsatisfactory performance/conduct to the President, NC&PB. The report will include recommendations to grant or deny clemency or reconsider any previous NC&PB/SECNAV decision to grant clemency.

b. In the event clemency has been directed by NC&PB/SECNAV, the commanding officer will also notify the OEGCMJ of the unsatisfactory performance/conduct. The OEGCMJ will withhold execution of the clemency action that has been directed, pending notification, reconsideration, and final determination.

c. The OEGCMJ who withholds clemency action due to an offender's unsatisfactory performance/conduct will make an immediate report to that effect to the President, NC&PB. Once the clemency action has been withheld, the OEGCMJ may not thereafter execute any part of the clemency action or execute a punitive separation until the decision of the NC&PB/SECNAV has been reconsidered and a final determination has been promulgated by the NC&PB.

d. When clemency has been withheld, a field service record or service record book entry will be made.

e. The offender will be notified by the commanding officer or the OEGCMJ of any NC&PB/SECNAV decisions involving clemency, including the withholding of clemency granted. When an offender is notified that clemency action ordered by the NC&PB/SECNAV is being withheld, the offender will also be advised of the reasons for the withholding and that he/she may submit matters to the NC&PB for its consideration in determining the status of its previous order of clemency.

f. Upon receipt of the OEGCMJ report notifying the NC&PB of the withholding of clemency, the NC&PB will promptly notify the offender of the date the NC&PB will reconsider its clemency action/recommendation, and provide the offender with the opportunity to submit, via the OEGCMJ, within a reasonable period of time, matters he/she desires the NC&PB to consider with regard to the alleged unsatisfactory performance/conduct. The NC&PB will then reconsider the clemency action/recommendation in light of the report of the OEGCMJ withholding the clemency action and matters presented by the offender. The NC&PB/SECNAV may reaffirm, modify or withdraw the clemency order previously issued.

414. Liaison. Authorities desiring to exercise clemency in an offender's case pursuant to their authority under Article 74, UCMJ, or authority delegated under section 0158 of the JAGMAN (other than the exercise of such authority in accordance with the issuance of a supplementary court-martial order as provided within this instruction) will coordinate with the NC&PB. Liaison will be accomplished for cases involving enlisted/officer offenders as follows:

a. An OEGCMJ under authority delegated in section 0158 of the JAGMAN who takes action to remit or suspend any part or amount of a sentence that includes a punitive separation or confinement of 12 months or more will ensure that a copy of the official action is forwarded, without delay, to the President, NC&PB, with one copy to the CMC (*PSL - Plans, Policy, Operations, Security, and Law Enforcement (Corrections)*) or BUPERS (*PERS-84*), as appropriate.

b. In order to avoid inconsistencies or conflicts, any OEGCMJ who plans to grant clemency, as described in the above paragraph, will determine whether or not the case is pending review by the NC&PB within the following three months.

(1) In the event the case is not scheduled for initial clemency review or annual review within the following 3 months, and a special review has not been directed as provided in paragraph 406, the OEGCMJ will exercise clemency as deemed appropriate and forward a copy of the action taken to NC&PB.

(2) If the review is scheduled within the following 3 months, the OEGCMJ will notify the President, NC&PB, that clemency action is being considered in the case. Upon receipt of such notification, the President, NC&PB, will delay NC&PB clemency review of the case until receipt of the OEGCMJ action in the case. The OEGCMJ will promptly forward to NC&PB a copy of the issued action (supplementary court-martial order).

415. Execution of Punitive Separations. Approved, unsuspended *punitive discharges/dismissals* of offenders will not be executed until the initial mandatory clemency review, held in accordance with this instruction, has been completed or waived, and judicial review is completed in accordance with Article 71, UCMJ. Upon completion of

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judicial and clemency review, the OEGCMJ, or other proper authority, will issue a supplemental court-martial order ordering the execution of the punitive discharge or *dismissal*. A copy of that supplemental court-martial order will be provided the NC&PB and CMC (*PSL-Corrections*) or BUPERS (PERS-84) and the Navy and Marine Corps Appellate Leave Activity, as appropriate.